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Property, Morality, and Moral Psychology: Comments on Gerhart's Property Law and Social Morality

Dave Fagundes

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PROPERTY, MORALITY, AND MORAL PSYCHOLOGY: COMMENTS ON GERHART'S *PROPERTY LAW AND SOCIAL MORALITY*

By Dave Fagundes[†]

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I. INTRODUCTION

The title of Professor Peter Gerhart's monograph, *Property and Social Morality*, signals the breadth of its ambitions. This is not work of narrow purpose that seeks only to reconcile substantive tensions in a dusty, obscure corner of the law. Rather, it engages an issue that lies at the heart of property itself: How can we construct a humane vision of ownership, built from the strands of different property traditions, that reflects and expresses the moral values of the community in which it operates?¹ Professor Gerhart's aims reach even beyond the content of property itself, touching on how the legal institution of ownership can help us construct a more "authentic community."²

Like other contributors to this symposium, I found *Property and Social Morality* both thought-provoking and convincing. My approach in these remarks is thus more additive than critical. I seek to enrich the dialogue about Professor Gerhart's work—and about property and social morality more generally—by examining his book through the lens of moral psychology. *Property and Social Morality* primarily concerns the normative question of what property's morality should be. My contribution to this symposium, by contrast, raises the descriptive question of what property's morality is, and seeks to show how the answer to that question has important repercussions for Professor Gerhart's work and for the study of property and social morality generally.

My comments will proceed in two parts. In Part I, I will briefly describe and summarize the study of moral psychology, indicating how it might apply to property law. And in Part II, I will analyze

[†] Professor of Law, Southwestern Law School. Thanks to Chris Buccafusco, Peter Gerhart, and Jessica Roberts for helpful comments on earlier drafts.

1. PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 4 (Cambridge Univ. Press 2013) (describing the methodological and substantive aims of his project).

2. *Id.* at ix (stating that one of his goals in *PROPERTY LAW AND SOCIAL MORALITY* is "to reorient the field to understand it as one about how individuals ought to treat one another if they are to form an authentic community").

Property and Social Morality through the lens of moral psychology, showing how Professor Gerhart's project may be advanced through a richer understanding of the content of our ethical beliefs about property and the psychological mechanisms that give rise to them.

II. MORAL PSYCHOLOGY AND PROPERTY

There are countless ways to approach the study of social morality. Professor Gerhart's book illustrates at least two of them. First, *Property and Social Morality* is an analytical theory that seeks to find a unified thread that runs elegantly through the mess that is the social institution of property. In what often seems to be a fractured field that is subject to numerous methodological approaches,³ Professor Gerhart's ambition is synthetic, seeking to show that these differing approaches to property law may be reconciled.⁴ And second, *Property and Social Morality* advances normative claims that seek to tell us what it means for individuals, owners and non-owners alike, to act ethically with respect to one another.⁵

There is, however, at least one more way to think about the study of social morality, not as an analytic question or a normative one, but as a descriptive matter: What do people think is right and wrong? As applied to property law, then, the question simply becomes: What do people think is right and wrong with respect to assertions of ownership? This is an empirical question that seeks only to understand and catalogue moral beliefs. And it is not the exclusive domain of psychologists—evolutionary biologists, anthropologists, and sociologists also explore the actual content of people's moral beliefs—but the resurgent field of moral psychology is at the forefront of renewed interest in descriptive ethics.

As applied to property, we can think of this descriptive approach to property and morality at three increasing levels of depth. At the surface, there are answers to straightforward questions about what people think about contemporary issues in property. This includes even simple canvasses of public opinion, such as asking whether people think that legislatures should pass Stand Your Ground laws,⁶ or whether they agree with Supreme Court property decisions like *Stop*

3. Scholars have approached property from the perspective of law and economics, critical race theory, corrective justice, and legal process—just to name a few. See GERHART, *supra* note 1, at 17–44 (identifying and summarizing some of these theories).

4. *Id.* at 4.

5. *Id.* at 19 (stating that the ambition of his work is to “help us understand the factors that lawmakers take into account, and ought to take into account, when they decide what the law should be”).

6. These are laws authorizing individuals to engage in self-defense when threatened with physical injury, and stating that individuals have no duty to retreat from any place they have a lawful right to be, particularly the home. http://en.wikipedia.org/wiki/Stand-your-ground_law.

the Beach Renourishment v. Florida or *Kelo v. City of New London*.⁷ This tells us something useful about the content of public moral opinion, but does not access anything terribly deep about the moral psychology of property. It is pretty easy to get a sense of whether people think a given controversial property issue is right or wrong, but much more difficult to get a sense of the mechanisms leading to these beliefs. Respondents to surveys could be expressing their considered moral intuitions, but they could also be merely trying to give the questioner the answer they think they want, or parroting a position they heard on a talk-radio rant or read in a newspaper editorial.

The desire to understand the underlying architecture of people's moral beliefs leads us into the domain of moral psychology. Work in this field has sought to investigate the mechanisms underlying the substantive ethical opinions people express.⁸ In the property context, some of the most interesting work comes from studies of animals and children, who represent promising subjects because their moral opinions will be relatively unaffected by political and cultural context. Children exhibit a lot of instincts we associate with property, such as a strong sense of the first in time, first in right principle.⁹ And even more surprising, animals such as ravens and bees similarly display territorial instincts and tend to defer to prior possessory claims.¹⁰

Third and finally, we can look past the content of people's moral beliefs to investigate the deep question of why people find certain conduct right or wrong at all. For example, Joshua Greene's work on the trolley problem has shown that our sense of morality is profoundly connected to notions of proximity, so that we may feel less concerned about pushing a button that seriously harms someone farther away than we do about inflicting a lesser degree of harm on someone with our own hands.¹¹ This research in particular may carry major implications for property law, in that it may explain why many people register no ethical qualms about engaging in even large-scale digital copyright infringement but are still deeply offended by even costless acts of physical trespass to real property.

7. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2111 tbl. 1 (2009) (showing a table summarizing illustrative polls assessing national opinion as to whether *Kelo* was rightly decided).

8. See Edouard Machery & Ron Mallon, *Evolution of Morality*, in THE MORAL PSYCHOLOGY HANDBOOK 3–46 (John M. Doris, ed., 2010) (to take just one example: some social scientists have sought to find evolutionary bases for human morality).

9. See Alex Shaw, Vivian Li & Kristina R. Olson, *Children Apply Principles of Physical Ownership to Ideas*, 36 COGNITIVE SCI. 1383, 1383–84 (2012) (finding that young children have moral intuitions about property including first in time, the wrongfulness of theft, and control of permission, and that these ideas operate with respect to both physical and intellectual property).

10. See Jeffrey Evans Stake, *The Property 'Instinct'*, 359 PHIL. TRANS.: BIOLOGICAL SCI. 1763, n. 1451 (2004).

11. See JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 113–16 (2013).

III. MORAL PSYCHOLOGY AND GERHART'S *PROPERTY LAW AND SOCIAL MORALITY*

With this background in mind, it remains to explore the connections between moral psychology and Professor Gerhart's *Property Law and Social Morality*. In this Part, I will articulate four ways that the moral psychology of property can add to and reflect on Professor Gerhart's theory of property.

First, a descriptive account of social beliefs about property's morality is essential to fleshing out Gerhart's vision because social beliefs about how owners and non-owners should treat each other lie at the core of his theory. Professor Gerhart places shared consensus about the proper scope of property rights at the center of his model. "It is the social recognition that comes from shared beliefs," he argues, "that gives property rights their scope and moral force."¹² In Gerhart's model, the content of what ethical beliefs are is inextricable from what those beliefs should—or at least can—be. The descriptive question of what those beliefs are is thus central to Gerhart's community-oriented vision of property.

Defining the content of property law by social consensus amounts to more than just an abstract matter of filling in the space created by Gerhart's broadly conceived theory. This issue has meaningful bite for whether and how that theory cashes out in practical terms. Property law does not just happen. Rather, it is created in Western societies largely by judges and legislatures. And Professor Gerhart argues that the normative force of property law is determined largely by whether it comports with social understandings of the appropriate scope of ownership rights. A court or legislature seeking to effect a moral vision of property would need to have a sense of shared beliefs about the proper scope of ownership in order to pass a law or render a decision consistent with Professor Gerhart's theory.¹³

A possible answer to this point is that democratic process suffices to correct any possible disjuncture between socially recognized ownership rights and substantive property law. It is possible that if courts and legislatures render decisions about or create property laws that are out of sync with social beliefs, higher courts will just overturn them, or the public will vote the offending politicians out of office.¹⁴ But these processes are imperfect, time-consuming, and most of all

12. GERHART, *supra* note 1, at 108.

13. In many respects, substantive law requires courts to take into account community ethical standards. *See, e.g.,* Miller v. California, 413 U.S. 15, 23–24 (1973) (articulating a test for obscenity under the First Amendment that looks in part to "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest").

14. When *Kelo* sparked public outrage, for example, state legislatures responded by passing a flurry of laws limiting the government's ability to take private property for economic development. *See* Somin, *supra* note 7, at 2114–54.

second-best ways to make law match up with social opinion. If courts and legislatures began with a better sense of the character of social beliefs about the proper scope of property rights, they would have a better chance of getting it right the first time and avoiding all the social costs of correcting matters after the fact.

Second, moral-psychological research has provided numerous colorful illustrations of something that we all know to be true: Consensus about the morality of a law or practice is no guarantee that the law or practice is something socially beneficial. For example, one study of moral beliefs conducted in Orissa, India, found that men and women alike found nothing ethically objectionable in a husband beating his wife black and blue if she affronted his authority by going out alone to see a movie.¹⁵

We might dismiss this as something peculiar to foreign cultures, and assure ourselves that American beliefs about morality could never tolerate such a brutal practice. But it takes only a moment's reflection on American history to call up examples from our own society where what seemed moral at one time seemed awful not long after. In relatively recent memory, society widely accepted legal bans on interracial marriage, and before that legal separation on a racial basis in public accommodations, and before that the outright ownership of slaves. Americans now increasingly express tolerance for same-sex marriage,¹⁶ but only a couple decades ago, the practice was both illegal and generally reviled.

Moral psychology often exposes ugly facts like these, reminding us to be skeptical of our ethical intuitions. The fact that society thinks a law is right or fair may give us some evidence of the morality of that law or practice, but it is far from conclusive. Descriptive claims about what is perceived as moral, that is, do not automatically translate into normative claims about what should be regarded as moral. And the notion that we often treat as unobjectionable practices and laws that are deeply socially harmful should give us pause when considering any theory that, like Professor Gerhart's, incorporates community beliefs about fairness as a major part of the substantive criteria for its notion of morality.

This critique does not affect the descriptive part of Professor Gerhart's theory in which he traces the origins of contemporary property

15. Richard Shweder et al., *Culture and Moral Development*, in *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN* 1–83 (Jerome Kagan & Sharon Lamb eds., 1987).

16. The most recent polls indicate that just over 50% of Americans support the practice, with a significant number expressing uncertainty. Peyton M. Craighill & Scott Clement, *Support for same-sex marriage hits new high; half say Constitution guarantees right*, WASH. POST, Mar. 5, 2014, http://www.washingtonpost.com/politics/support-for-same-sex-marriage-hits-new-high-half-say-constitution-guarantees-right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c_story.html (reporting results of a poll finding that 59% of Americans support same-sex marriage).

law.¹⁷ This is a very elegant evolutionary story about property's roots in violence and norms through the emergence of commons and into the development of the modern state, and it remains true regardless of whether the beliefs on which a property system is based look good or bad in historical perspective. But Gerhart's theory is not just an explanatory account, like Demsetz's, that seeks only to identify the source of private property rights.¹⁸ On the contrary, values figure centrally in Gerhart's model. "We can understand property," he asserts, "by the values that serve as inputs into determining the relationships between individuals."¹⁹ What may be missing from Professor Gerhart's model is some failsafe for making sure that privileging majoritarian consensus about property's morality does not lead to the entrenchment of socially harmful beliefs, especially to minority groups whose voices may not be fully heard.

This second question rooted in descriptive moral psychology raises a third, and related one: Whether we can ever really say that there is a true social consensus about what moral conduct in property—or any area, legal or otherwise—is. Beliefs about morality diverge widely among different societies, as Professor Gerhart correctly notes²⁰ (80), but they persist within societies and cultures as well. Studies have found profound splits in terms of income and geography that appear to reflect not just different opinions about morally-charged contemporary issues, but foundationally different value structures that underlie those beliefs. In fact, sometimes there is more consistency across cultures than within them. One study found that lower-income people in the United States responded to survey questions posing ethical quandaries in a way that more closely mirrored the responses of people of the same socioeconomic status in Brazil than the answers of higher-socioeconomic-status Americans.²¹

This high level of disagreement, both inter- and intra-culturally, about basic moral propositions means two things for Professor Gerhart's theory. First, it raises a series of hard questions about implementation. If we want courts and legislatures to reflect what Professor Gerhart calls "recognition norms" that have been used to give rise to a certain scope of ownership rights, which recognition norm should they select? Is this something that can simply be

17. See GERHART, *supra* note 1, at 92–102 (discussing the evolution of property).

18. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (locating the origin of property rights in the need to create defined, tradeable entitlements when demand for previously common resources arises).

19. GERHART, *supra* note 1, at 9.

20. *Id.* at 80 ("[T]he norms that facilitate cooperation will differ from society to society depending on what kind of shared belief a society forms from the interaction of individuals, based on repeated social interactions.").

21. See JONATHAN HAIDT, *THE RIGHTeous MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 24–26 (First Vintage Books ed. 2012) (summarizing these conclusions).

papered over by reference to the political process or does that just run headlong into a host of other critiques of majoritarian democracy? Professor Gerhart touches on this issue, and suggests that disagreement about ethical propositions will eventually be smoothed out by “repeated social interactions.”²² But it is not clear what good the eventual convergence of moral beliefs does for a decision maker currently faced with resolving a property dispute must mediate between plural ethical perspectives.

The variety of morality also reflects on Professor Gerhart’s evolutionary story about property emerging out of social consensus. As societies accept certain exercises of ownership rights and reject others (perhaps through violence), he avers, a stable norm about the proper scope of property rights emerges.²³ But how can we square the persistence of many different views about the legitimacy of different “recognition norms” with the presence of relatively uniform substantive property law? One possible answer is that people do not agree to abide by property ownership rules because they find them to be morally right, but rather because they provide an appealing alternative to the chaos that would ensue in the absence of any rules. Robert Sugden, for example, suggests that law’s rules—including, but not limited to property—are mere coordination devices that rise up only because of the need for social order, not because they possess normative content.²⁴

The fourth and final point gets to an assumption that pervades not only *Property and Social Morality*, but also most great legal theory. A foundational question left unexplored by Professor Gerhart is: What does it mean for something to be moral? Not all answers to the question “What should I do?” fall within the domain of morality. If I ask, “Should we have the death penalty?” that is plainly a moral question, and a very difficult one. If, however, I query, “Should I go to Sizzler or Applebees?” that poses a delicious dilemma, but it does not sound in an ethical register. The hard question, which hovers unanswered over most legal literature, is: What is the content of the former inquiry that makes it a moral issue rather than one of the countless mundane decisions that populate our daily lives?

Property and Social Morality implicitly takes some position on this by focusing its inquiries on two major notions of morality. First, people should not harm one another, such as by respecting each other’s property entitlements.²⁵ Second, people should treat each other ac-

22. GERHART, *supra* note 1, at 80.

23. *Id.* at 92–102.

24. See Robert Sugden, *Spontaneous Order*, 3 J. ECON. PERSP. 85, 97 (1989) (arguing that the emergence of social order is not a matter of efficiency or morality but “is simply replication,” and “cannot . . . be justified in terms of any system of morality that sees society as having an overall objective or welfare function”).

25. GERHART, *supra* note 1, at 61 (summarizing basic propositions of his theory in terms of “other-regarding” obligations of property owners and non-owners).

according to some rough notion of justice, such as by engaging in decisions that appropriately allocate the burdens and benefits of ownership.²⁶ The notion that morality is about harm and fairness has a lot of intuitive appeal, largely because its genealogy goes all the way back to the Enlightenment—Bentham and Kant, utilitarianism and deontology—and forms the basis for basically all of the scholarship that Professor Gerhart synthesizes in his monograph.²⁷

Recent work in moral psychology, though, and particularly the work of Jonathan Haidt, has suggested that the domain of morality is broader than just harm and fairness, and that a host of other considerations—loyalty and disloyalty, authority and subversion, purity and degradation, liberty and oppression—give rise to moral intuitions about right and wrong as well.²⁸ That people have ethical instincts along metrics that are not captured by traditional approaches to morality does not automatically mean that visions of property's morality must account for those instincts. But it does mean that the story of morality may be a lot more complicated than harm and fairness. For work like Professor Gerhart's that seeks to propound an all-encompassing vision of social morality, this new research poses a hard question whether it is possible to achieve that ambition by focusing only on the traditional moral considerations of harm and fairness.

IV. CONCLUSION

As the foregoing indicates, moral psychology has much to tell us about the normative questions that occupy Professor Gerhart's work and indeed about most contemporary property scholarship as well. Despite this, and however much social scientists have displayed renewed interest in moral psychology of late, legal scholars have yet to fully mine the potential of moral psychology in property or any other subfields of law.²⁹ Contemporary writing about property features a lot of great theories and normative prescriptions about how we should govern ownership, but in terms of cataloguing and understanding the actual content of people's beliefs about property's morality, there is a conspicuous blank. The foregoing discussion thus represents not only a contribution to the dialogue about *Property and Social Morality*, but

26. *Id.*

27. For a good overview of the reduction of plural morality into the harm/fairness dichotomy, see Jonathan Haidt & Selin Kesebir, *Morality*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 797 (Susan Fiske et al. eds., 5th ed. 2010) (tracing the Western vision of morality as concerning only harm and fairness to the Enlightenment, and referring to this as the "Great Narrowing").

28. For a good overview of this work, see Haidt, *supra* note 21, at 111–218.

29. There are a handful of exceptions. See Jonathan Haidt, *Moral Psychology and Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence*, 64 ALA. L. REV. 867 (2013); David Fagundes & Chris Buccafusco, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. (forthcoming 2015).

also a blueprint for how moral psychology can inform and enrich scholarship about property more generally.